Vox Funding LLC v Graceful LLC
2024 NY Slip Op 30602(U)
February 22, 2024
Supreme Court, Kings County
Docket Number: Index No. 527315/2023
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of February 2024

HONORABLE FRANCOIS A. RIVERA

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VOX FUNDING LLC,

Plaintiff,

- against -

GRACEFUL LLC and JOSHUA STONE,

Defendants.

---X

DECISION & ORDER

Index No.: 527315/2023

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by Vox Funding LLC (hereinafter VFL or plaintiff) on December 19, 2023, under motion sequence one, for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on the claims asserted in its complaint against the defendants Graceful LLC (hereinafter the LLC defendant) and Joshua Stone (hereinafter the Guarantor)(collectively as defendants).

-Notice of Motion
-Affidavit in Support
Exhibits A-D
-Affirmation in Support
Exhibit 1 and 2
-Statement of Material Facts
-Memorandum of law in support
-Affidavit in opposition
-Response to statement of material facts
-Affirmation in reply
-Affidavit in reply

BACKGROUND

On September 20. 2023, VFL commenced the instant action for, inter alia, breach of contract by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On October 20, 2023, the defendants joined issued by interposing and filing a joint

verified answer with the KCCO. The complaint alleges forty-one allegations of fact in support of four causes of action, namely, breach of contract, breach of a personal guaranty agreement, attorneys' fees and cost, and conversion.

On October 20, 2023, the defendants interposed and filed a joint answer asserting sixteen affirmative defenses with the KCCO.

The verified complaint alleges the following salient facts. On or about November 22, 2022, VFL and the defendants entered into an agreement whereby VFL agreed to purchase all rights to the LLC defendant's future receivables having an agreed upon value of $102,750.00 (hereinafter the Agreement) for the purchase price of $75,000.00. VFL remitted the purchase price to the LLC defendant. Pursuant to the Agreement, the LLC defendant agreed to remit to a specified percentage of their receivables. On February 28, 2023, the LLC defendant stopped making payments to VFL and breached the Agreement by intentionally impeding and preventing VFL from making the agreed upon ACH withdrawals from the LLC defendant's bank account while conducting regular business operations and still in receipt of accounts receivable.

In addition, Joshua Stone, the Guarantor agreed to guarantee any, and all amounts owed to VFL from LLC defendant upon a breach in performance by LLC defendant.

The LLC defendant initially met its obligations under the Agreement and made payments totaling $41,742.22, leaving a balance of $61,007.78. Nevertheless, the LLC defendant is alleged to have failed to pay the amounts owed to VFL under the Agreement.

The Guarantor is alleged to be responsible for all amounts incurred because of the LLC defendant's default. There remains a balance due to VFL on the Agreement in the amount of $61,007.78, plus interest, costs, fees, disbursements, and attorney's fees.

There remains a balance due and owing to plaintiff on the Agreement in the amount of $158,497.02 plus interest, costs, and disbursements.

VFL alleges that LLC defendant has materially breached the Agreement and is intentionally impeding and preventing VFL from receiving the proceeds of the receivables purchased. VFL also alleges that pursuant to the Agreement, the Guarantor personally guaranteed to be personally liable for any loss suffered by VFL. VFL contends that it is entitled to a judgment against the Guarantor based on the personal guarantee for the sum of $61,007.78, plus interest, costs, disbursements, and attorney's fees.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Giuffrida v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b), a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Furthermore, all the

evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach (*Cruz v Cruz*, 213 AD3d 805 [2nd Dept 2023]).

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*C & B Enters. USA, LLC v. Koegel*, 136 A.D.3d 957, 958 [2nd Dept 2016]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's right (*Colavito v. New York Organ Donor Network, Inc*., 8 N.Y.3d 43 at 50 [2006]). Money, if specifically identifiable, may be the subject of a conversion action (*Simpson & Simpson, PLLC v. Lippes Mathias Wexler Friedman LLP*, 130 A.D.3d 1543, 1544–1545 [4th Dept 2015]). "[C]onversion occurs when funds designated for a particular purpose are used for an unauthorized purpose" (*Petrone v Davidoff Hutcher & Citron, LLP*, 150 A.D.3d 776 [2nd Dept 2017] citing, *East Schodack Fire Co., Inc. v. Milkewicz*, 140 A.D.3d 1255 at 1256 [3rd Dept 2016]).

LAW AND APPLICATION

In the case at bar, the only sworn testimony submitted by VFL in support of the motion was an affirmation of Derek M. Medola, its counsel, (hereinafter Medola), and an affidavit of

Louis Calderone, its president (hereinafter Calderone). Medola's affirmation contained no allegations of facts regarding the transaction alleged in the verified complaint.

Calderone's affidavit alleges seventeen allegations of fact. He alleges that he is the president of VFI and, as such, has personal knowledge after reviewing VFI's records except as to those natters stated upon information and belief. He refers to four documents attached to the motion, namely, the agreement, a document described as a wire confirmation, a document denominated as a statement of account, and a document denominated as an ACH rejection history.

It is noted that Calderone is not a signatory to the agreement. Nor has he alleged that he participated in the execution of same. Calderone's allegations of fact regarding the agreement are not based on personal knowledge but rather are derived from reviewing business records. He alleges that VFI paid the LLC the purchase price of $75,000.00 as evidenced by a wire confirmation annexed as exhibit B. Exhibit B, however, did not contain any entry in the amount of $75,000.00. There is a lesser figure, however, the lessor figure is not explained. Calderone avers that the statement of account, annexed as exhibit C to his affidavit, shows the payments made by the defendants "during this period". He does not make clear what period he is referring to. He also avers that the document denominated as an ACH rejection history, annexed as exhibit D to his affidavit, shows the electronic payments that were returned unpayable.

The verified complaint alleges that a bank selected by the defendant and approved by the plaintiff would be the designated bank for the deposit of the LLC's defendant's receivables. Calderone does not identify the designated bank or provide any documentation that contains the

name of a bank. Exhibit D appears to be an internal record of the plaintiff. Exhibit D did not state the name of a bank or reflect that it was a bank statement.

A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures (*Citibank, N.A. v Cabrera*, 130 AD3d 861, 861 [2d Dept 2015]). Generally, the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records (*Bank of NY Mellon v Gordon*, 171 AD3d 197, 209 [2d Dept 2019]). However, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures or establish that the records provided by the maker were merged into the recipient's own records and routinely relied upon by the recipient in its own business (*id.* at 209).

Here, the ACH rejection history is submitted without explaining it source, or its meaning. There is an insufficient foundation for its admission as a business record. Moreover, Calderone has averred that the LLC defendant ceased payment authorizations for the ACH payments constituting a default of the Agreement. However, no business record reflecting this fact was admitted. It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted (*Citibank, N.A. v Potente*, 210 AD3d 861, 862 [2d Dept 2022]). Accordingly, evidence of the contents of business records is admissible only where the records themselves are introduced. Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay (*Bank of New York Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]).

In sum, VFL has failed to make a prima facie showing that the LLC defendant breached the Agreement. It is noted that neither the verified complaint, nor the affidavit of Calderone alleges that VFL demanded payment from Joshua Stone before it commenced the action. In any event, by not demonstrating that the LLC defendant breached the Agreement, VFL has also failed to show that the obligation of the guarantor was triggered. Similarly, VFL's entitlement to attorney's fees and cost based on the alleged breach of the agreement is not established. VFL's motion for summary judgment is denied for failure to make a prima facie showing of entitlement without regard to the sufficiency of the defendants' opposing papers (*Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 [1985]).

CONCLUSION

The motion by plaintiff Vox Funding LLC for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on the claims asserted in its complaint against the defendants Graceful LLC and Joshua Stone is denied.

A copy of this decision and order, along with notice of entry, shall be served upon defendants and filed with the Court within 20 days of entry.

The foregoing constitutes the decision and order of the Court.

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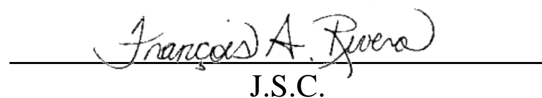

J.S.C.